

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DARRELL KNAPP)	
Claimant)	
VS.)	
)	Docket No. 199,541
CENTRAL AIR CONDITIONING CO., INC.)	
Respondent)	
AND)	
)	
GENERAL CASUALTY CO. OF WISCONSIN)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund appealed the Award dated October 17, 1997, and the Award Nunc Pro Tunc dated October 20, 1997, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument in Wichita, Kansas, on April 10, 1998.

APPEARANCES

Gary A. Winfrey appeared for the respondent and its insurance carrier. Chris S. Cole appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This appeal only concerns the liability of the Workers Compensation Fund. The Administrative Law Judge found the Fund responsible for all the benefits due in this claim. The Fund, however, contends the respondent did not prove it had knowledge of a preexisting impairment to claimant's hip. In the alternative, the Fund argues respondent

failed to prove that claimant's injury would not have occurred but for the preexisting impairment.

The only issue before the Appeals Board on this appeal is:

What is the liability of the Workers Compensation Fund, if any?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) While working for Central Air Conditioning Co., Inc., on August 2, 1991, Darrell Knapp fell from a ladder and fractured his left femur. During treatment for the fractured left leg, Mr. Knapp developed medical complications that rendered him severely disabled. The parties have stipulated Mr. Knapp is permanently and totally disabled as the result of this work-related accident.

(2) Long before the August 1991 accident, Mr. Knapp had experienced problems with his hips. He had limped since 1944 when he was in the armed forces. And before August 1991, he had undergone two right hip replacements and two left hip replacements. Although he does not know what caused him to fall on August 2, 1991, Mr. Knapp does not believe his bilateral hip problems caused the accident.

(3) Board-certified orthopedic surgeon Ely Bartal, M.D., operated on Mr. Knapp's leg the day after the accident and performed an open reduction and inserted a plate with screws. Mr. Knapp then developed an infection at the surgical site that was treated with intravenous and oral antibiotics. In 1993, Dr. Bartal removed the hardware and inserted antibiotic beads in that area. Sometime between 1993 and 1995, the doctor performed bone grafting to the left femur. In 1995, Mr. Knapp developed septicemia in the low back. Because the infection could not be controlled, in April 1996 the left total hip arthroplasty was removed. Sometime in 1996, the doctor diagnosed vertebral osteomyelitis.

(4) The fractured left femur and the medical complications that followed are directly and causally related to the August 2, 1991, work-related accident. That conclusion is based upon the testimony of Dr. Bartal, the only physician to testify in this claim. Further, the parties have not argued otherwise.

(5) Because he had an artificial hip, Mr. Knapp broke his left femur immediately below the steel stem that had been inserted during one of the earlier hip replacements. Without the artificial hip, Mr. Knapp probably would have fractured his left hip or fractured the femur higher at the hip level. Dr. Bartal explained:

I think that if he would have not had a total hip replacement there, Mr. Knapp would have broken his hip. Because he has a hip replacement there, the

weakest point of the construct was distal to the stem and, therefore, it broke below the stem. Does that answer your question? . . .

At his age, a person of this age falling from a ladder most likely will break his hip, okay? Mr. Knapp did not break the hip because of this stem, so he has to break something else. So is it related to the hip or not? He would have a fracture anyway with or without a hip, with or without the implant is what I'm saying. . . .

Maybe the location -- the location of the fracture is related to the fact that he has a previous artificial hip, but if the artificial hip would not have been there, he would have most likely broken his leg higher at the level of the hip. Maybe I've complicated the matter now.

(6) Based upon Dr. Bartal's testimony, the Appeals Board finds that it is more probably true than not that Mr. Knapp had an infection in the left hip that was aggravated by the August 1991 accident.

(7) Dr. Bartal also testified that Mr. Knapp would not now be permanently and totally disabled but for the preexisting left hip arthroplasty. That testimony is uncontroverted.

(8) Central Air Conditioning had knowledge of Mr. Knapp's hip problems before the August 1991 accident. Before the accident, the hip problems were severe enough to constitute a handicap in obtaining or retaining employment. Despite that knowledge, Central Air Conditioning retained Mr. Knapp in its employment. Those conclusions are based upon the testimony of Jack O'Connor, Frank Rinke, and Jerry Jones. Mr. O'Connor testified that he was Mr. Knapp's foreman on the date of accident and had known him since 1960. Before the accident, Mr. O'Connor had spoken with Mr. Knapp about his hip replacements. Both Mr. O'Connor and Mr. Jones described how Mr. Knapp walked with a pronounced limp in a sideways fashion dragging one leg behind. Both Mr. O'Connor and Mr. Rinke, one of Central Air Conditioning's part owners, tried to accommodate Mr. Knapp by assigning him less strenuous work that did not require heavy lifting or climbing ladders. Because of Mr. Knapp's hips, the company was concerned for his safety and his ability to perform certain tasks.

CONCLUSIONS OF LAW

The Award entered by the Administrative Law Judge should be affirmed.

If an employer knowingly hired or retained a handicapped worker, the law in effect in August 1991 allowed the employer to shift either partial or total responsibility to the Fund if the worker was later injured. If the subsequent injury, disability, or death would not have occurred but for the preexisting impairment, the employer could shift total responsibility for the subsequent injury to the Fund. If, however, the injury probably would have occurred regardless of the preexisting impairment, the employer could shift partial responsibility to

the Fund to the extent the preexisting impairment contributed to the resulting disability. K.S.A. 1991 Supp. 44-567.

The Appeals Board finds and concludes that Central Air Conditioning hired and retained Mr. Knapp in its employ with knowledge that he was impaired to such an extent that he was handicapped as defined by K.S.A. 44-566 (Ensley). As indicated above, Mr. Knapp's foreman had known him since 1960 and had spoken with him about his hip replacements. Because Mr. Knapp had limited mobility and was limited in his ability to perform certain tasks, the company attempted to accommodate his impairment when it assigned work.

The Appeals Board also finds that Mr. Knapp would not have developed the medical complications or have been rendered permanently and totally disabled but for the preexisting left hip replacement. Those conclusions are based upon Dr. Bartal's uncontroverted testimony, which is credible and persuasive.

Based upon the above, the Fund is responsible for all of the benefits associated with this claim under K.S.A. 1991 Supp. 44-567(a)(1).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated October 17, 1997, and Award Nunc Pro Tunc dated October 20, 1997, both entered by Administrative Law Judge Jon L. Frobish, are affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary A. Winfrey, Wichita, KS
Chris S. Cole, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director